In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 539

CHARLES M. WEBER, DOING BUSINESS AS WEBER-MILLICAN & COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

Petitioner seeks review in this Court of a *per curiam* decision of the Court of Appeals for the Second Circuit which affirmed an order of the Securities and Exchange Commission. The opinion of the court below (Pet. 26) is reported at 222 F. 2d 822.

In its order which was affirmed below, the Commission revoked the registration of petitioner as a securities broker and dealer under the Securites Exchange Act of 1934 and expelled him from membership in the National Association of Securities Dealers, Inc., a national securities associa-

tion registered with the Commission pursuant to that Act. The Commission's order was predicated upon findings (Pet. 17–23) that petitioner had wilfully violated the anti-fraud provisions of Section 17 (a) of the Securities Act of 1933, 48 Stat. 74, 84, 15 U. S. C. 77q (a) (Pet. 11–12), and Section 15 (c) (1) of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 49 Stat. 1377; 52 Stat. 1075, 15 U. S. C. 78o (c) (1), together with Rule X–15C1–2 promulgated thereunder (Pet. 12–13).

The violations occurred in connection with sales by petitioner of stock of Inland Oil Company (Inland) and Magma King Manganese Mining Company (Magma King). Briefly, the Commission found that petitioner, while selling stock of Inland to the public as underwriter, improperly caused the diversion of funds from Inland to his own use and that his failure to disclose this diversion constituted fraudulent conduct. The Commission's conclusion was based also on petitioner's failure to disclose other material discrepancies between statements contained in the prospectus used in the sale of the stock and the actual facts. In addition, it was found that affirmative false representations were made in the sales of Inland stock. (Pet. 18–21.) The court below held that "[t]he evidence amply supports the Commission's conclusions that petitioner was guilty of fraudulent misstatements and of wrongful diversions of funds in connection with his underwriting of an issue of stock for Inland" (Pet. 26).

With respect to the Magma King transactions, the Commission found that (a) petitioner's failure to reveal that the price at which he sold the stock was substantially above the prevailing market price, and (b) petitioner's express misrepresentations as to the prevailing market price of the stock constituted fraudulent conduct within the meaning of the anti-fraud provisions cited above. Between December 1952 and January 1953, petitioner purchased shares of Magma King stock from other brokers and dealers at an average price of 27 cents a share and from members of the public at an average price of 28.6 cents a share. During this period, petitioner sold the stock to the public at a price, in almost every instance, of 40 cents a share. His average mark-up over cost was 43½%. During this period, the stock was quoted in the daily sheets published by the National Quotation Bureau, which gives the prices bid and asked by interested dealers for securities traded outside the securities exchanges. The price which petitioner charged his customers was 38.9%, on the average, above the highest current independent offering price of the stock in the National Daily Quotation Sheets. (Pet. 21–22.) The court below held that "the Commission was equally justified in finding that petitioner had sold Magma King shares to the general public on his own account without adequate disclosure of the great disparity between his sales price and the current market prices" (Pet. 26). The court

also stated that it saw no reason not to adhere to its prior decision in *Charles Hughes & Co.* v. *S. E. C.*, 139 F. 2d 434 (C. A. 2), certiorari denied, 321 U. S. 786, permitting the introduction of National Daily Quotation Sheets as evidence of such market prices.

The Commission found that the violations with respect to either the Inland or the Magma King stock would by themselves warrant the sanctions imposed[1] (Pet. 23). The Court of Appeals concluded its opinion with the observation that the sanctions imposed by the Commission for "these serious breaches of duty by the petitioner were certainly not so excessive as to constitute an abuse of administrative discretion" (Pet. 26).

1. Petitioner contends that certiorari should be granted on the ground that the admission of the National Daily Quotation Sheets in evidence was improper and that therefore there is insufficient evidence in the record to support the findngs that petitioner violated the Acts as regards the Magma King transactions. Obviously this question is not one of general importance or appropriate for review by this Court. Nor, as petitioner concedes (Pet. 7), does the decision of the court below as to the admissibility of the sheets conflict with a decision of any other court of appeals. In addition, as already noted, this evidence is relevant

[1] As above noted, these sanctions were revocation of petitioner's registration as a broker and dealer and expulsion from the National Association of Security Dealers (Pet. 23).

only to the charges arising out of petitioner's sales of Magma King stock, and both the Commission and the court below agreed that petitioner also had committed equally flagrant violations of the anti-fraud provisions of the Acts in his sales of Inland shares.

2. With respect to petitioner's further contention that the sanctions imposed constituted an abuse of administrative discretion under the circumstances of this case, it is manifest that such an allegation presents no important question of federal law appropriate for review by this Court.

3. The final ground upon which petitioner seeks review by this Court is a claim that he has been denied due process of law since Congress has combined in the Commission, as an agency, the functions of "investigator, prosecutor and adjudicator" of violations of the Federal securities laws. Although a similar contention was contained in the petition for review filed with the court below, petitioner did not urge the point in his brief below.

In the present petition, petitioner cites generally the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*, as evidence that such a combination of functions is to be condemned. However, he cites no provision of that Act which was not complied with in the present proceeding and cites no case holding such a combination of functions violative of due process. Indeed, the section of the Administrative Procedure Act

which deals with the separation of administrative functions, Section 5 (c), 60 Stat. at 240, 5 U. S. C. 1004 (c), makes it illegal to combine such functions in particular individuals but specifically excepts from its provisions "the agency or any member or members of the body comprising the agency". This exception was expressly recognized in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, which petitioner cites to support his position (Pet. 5). In the more recent case of *Marcello* v. *Bonds,* 349 U. S. 302, this Court held that the fact that a special inquiry officer in deportation proceedings was subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions did not so strip the deportation hearing of fairness and impartiality as to make the procedure violative of due process. Although numerous federal agencies are designated by Congress to perform such a combination of functions, this Court has never held this to be a violation of the constitutional guarantee of due process, and a number of lower courts have overruled such contentions. See *Levers* v. *Berkshire,* 159 F. 2d 689 (C. A. 10); *Berkshire Employees Ass'n* v. *N. L. R. B.,* 121 F. 2d 235 (C. A. 3); *Wright* v. *S. E. C.,* 112 F. 2d 89 (C. A. 2); *Palmer* v. *Ultimo,* 69 F. 2d 1 (C. A. 7); *Reynolds* v. *United States ex rel. Dean,* 68 F. 2d 346 (C. A. 4). Actually, petitioner's position is unrealistic. The Commissioners themselves exercise only a most gen-

eral guidance over investigations and enforcement activities which are under the direct supervision of its various division heads, and the individuals engaged in the performance of investigative or prosecuting functions do not participate or advise in the decision of the case except as witness or counsel in public proceedings.

In conclusion, we submit that the contentions of petitioner provide no occasion for further review by this Court, that no important question is presented by the petition, and that there is no conflict in the decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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